

Annual Survey of Massachusetts Law

Volume 1986

Article 4

1-1-1986

Chapter 1:Contracts

Brian A. Berube

Joseph A. DiBrigida Jr.

James P. Hawkins

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>



Part of the [Contracts Commons](#)

Recommended Citation

Berube, Brian A.; DiBrigida, Joseph A. Jr.; and Hawkins, James P. (1986) "Chapter 1:Contracts," *Annual Survey of Massachusetts Law*: Vol. 1986, Article 4.

CHAPTER 1

Contracts

SURVEY Staff†

§ 1.1. Personal Liability Arising From the Use of D/B/A in Corporate Signatures and Court's Unwillingness to Infer Liquidated Damages from an Escrow Arrangement.* During the *Survey* year, the Massachusetts Supreme Judicial Court, in *Pedersen v. Leahy*,¹ addressed two issues arising from a vendor's breach of a purchase and sale agreement. The first issue, one of first impression, was whether personal liability ensued from a purported corporate signature signed by an individual officer of the corporation followed by d/b/a (doing business as) and the corporate name.² In the Commonwealth the proper way to charge the principal or corporation, thereby avoiding personal liability for the officer or agent, is for the agent to sign indicating the corporation as the signatory party, and to indicate his or her agency capacity.³ Finding that the d/b/a signature did not fit into this agent/principal framework, the Court held the individual personally bound.⁴

The Court also considered, as a matter of first impression, whether an escrow arrangement implied a liquidated damages clause covering remaining construction work.⁵ A liquidated damage is a fixed sum agreed upon at the time the contract is entered into, which estimates the extent of damages that will be caused by a breach of contract.⁶ A contract may include such a clause, which fixes the extent of damages recoverable, where the damages will be "uncertain in nature or amount or difficult of ascertainment," and the sum is fair.⁷ In *Pedersen*, the Court found that the escrow agreement was not a liquidated damages clause.⁸ These hold-

† Brian A. Berube, Joseph A. DiBrigida Jr., James P. Hawkins.

* Brian A. Berube, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.1. ¹ 397 Mass. 689, 493 N.E.2d 486 (1986).

² *Pedersen*, 397 Mass. at 690–91, 493 N.E.2d at 486–87.

³ C. A. PEAIRS, JR., BUSINESS CORPORATIONS, vol. 13A MASS. PRACTICE SERIES § 487 (2d ed. 1971).

⁴ *Pedersen*, 397 Mass. at 691, 493 N.E.2d at 487.

⁵ *Id.* at 692, 493 N.E.2d at 487–88.

⁶ *Factory Realty Corp. v. Corbin-Holmes Shoe Co.*, 312 Mass. 325, 331, 44 N.E.2d 671, 674 (1942) (quoting 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 776 (3d ed. 1961)).

⁷ 25 C.J.S. *Damages* § 101 (1966).

⁸ *Pedersen*, 397 Mass. at 692, 493 N.E.2d at 487–88.

ings are important in understanding the range of liabilities arising from a seller's breach of a purchase and sale agreement for a lot of land and accompanying house.

In *Pedersen*, the plaintiffs, Mr. and Mrs. Pedersen, entered into a purchase and sale agreement with the defendant, Francis Leahy (Leahy), to purchase a house in Canton, Massachusetts.⁹ The defendant, Leahy, was the president and treasurer of Neponset Valley Builders, Inc. (Neponset Valley), a home construction business. Leahy also constructed homes individually and independent from Neponset Valley.¹⁰

The Pedersens submitted an offer to purchase property to Neponset Valley. Leahy personally signed the acceptance of the offer.¹¹ On October 16, 1978, the Pedersens signed a purchase and sale agreement signed by Leahy as "Francis Leahy, DBA Neponset Valley Builders, Inc."¹² The purchase and sale agreement also contained an "acceptance of deed" clause, which discharged the seller of any further obligations upon the buyer's acceptance of the deed, except for those obligations containing terms requiring performance after acceptance of the deed.¹³ At the closing, the Pedersens placed \$750 of the purchase price in escrow to cover the remaining work to be done by Leahy.¹⁴

When Leahy failed to complete the remaining work, which amounted to a cost of \$11,401,¹⁵ the Pedersens brought an action for breach of contract.¹⁶ On these facts the superior court found in favor of the Pedersens,¹⁷ and the defendant, Leahy, appealed. The Supreme Judicial Court took the case from the Appeals Court on its own initiative.¹⁸

⁹ *Id.* at 690, 493 N.E.2d at 486.

¹⁰ *Id.*

¹¹ *Id.* at 690, 493 N.E.2d at 486-87.

¹² *Id.* at 690, 493 N.E.2d at 487. Other signatures and transactions that took place during this period included: An occupancy permit issued by the Town of Canton to Leahy. *Id.* On the actual deed, Neponset Valley appeared as the grantor of the deed. *Id.* Leahy signed the deed in an agency capacity, by executing it on behalf of Neponset Valley as its president and treasurer. *Id.* The settlement statement, prepared for the closing, indicated Neponset Valley as the seller, however, Leahy signed it personally on the seller's line. *Id.*

¹³ *Id.* at 691, 493 N.E.2d at 487. The clause provided:

The acceptance of a deed by the Buyer or his nominee as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed except such as are, by the terms hereof, to be performed after delivery of said deed.

Id.

¹⁴ *Id.* at 690, 493 N.E.2d at 486.

¹⁵ *Id.* at 691, 493 N.E.2d at 487. The cost of \$11,401 was derived from the expenses of employing carpenters, plumbers, electricians, and workmen to place the house in a condition as contemplated by the parties. Complaint at 7, *Pedersen v. Leahy*, 397 Mass. 689, 493 N.E.2d 486 (1986).

¹⁶ *Pedersen*, 397 Mass. at 690, 493 N.E.2d at 486.

¹⁷ *Id.* at 692, 493 N.E.2d at 488.

¹⁸ *Id.* at 689, 493 N.E.2d at 486.

The Court first addressed the individual liability of Leahy on the purchase and sale agreement. The Court noted that Leahy executed the purchase and sale agreement with his name followed by “DBA Neponset Valley Builders.”¹⁹ The Court concluded that this form of signature attached personal liability to Leahy because he signed the contract without any limitation, and because he named the corporation “as a trade name under which [he], an individual, did business.”²⁰

In reaching this conclusion, the Court relied upon *Southern Ins. Co. v. Consumer Ins. Agency Inc.*,²¹ in which the United States District Court for the Eastern District of Louisiana held that under Texas law,²² when the phrase “doing business as” follows an individual’s name, the individual is “personally liable for the torts and contracts of the business.”²³ The Supreme Judicial Court in *Pedersen*, also relied on the reasoning used by the Court of Appeal of Louisiana in *McKendall v. Williams*.²⁴ In *McKendall*, an officer of a corporation obtained a personal bank loan, the record of which indicated it was a d/b/a loan.²⁵ The Court of Appeal of Louisiana held that absent an express indication on the record that a corporate signatory was acting in an official capacity, the presence of d/b/a would not bind the corporation.²⁶

Relying upon these two cases, the *Pedersen* Court ruled that a d/b/a corporate signature bound Leahy in his individual capacity. The Court went on to note that the issue of whether one acted in the capacity of an agent is normally reduced to a question of fact.²⁷ Here, however, the

¹⁹ *Id.* at 691, 493 N.E.2d at 487.

²⁰ *Id.* (quoting *Southern Ins. Co. v. Consumer Ins. Agency, Inc.*, 442 F. Supp. 30, 32 (E.D. La. 1977)).

²¹ 442 F. Supp. at 30. In *Southern Insurance*, the defendant, Moore, had entered into an insurance agency agreement for the sale of the plaintiff’s, Southern’s, policies in the state of Louisiana. *Southern Ins.*, 442 F. Supp. at 30. The agency agreement stated that it was “between W.C. Moore d/b/a Consumer Insurance Agency Inc. of New Orleans . . . and Southern Insurance Co.” *Id.* at 31. W.C. Moore personally signed the agreement without qualifying his signature in any way. *Id.* In an action to collect premiums owed to it, Southern filed suit against W.C. Moore individually. *Id.* at 30.

²² Texas law was applied because the agreement provided that the contract was to be construed under Texas law. *Id.* at 31.

²³ *Id.* The district court reasoned that such a phrase indicated that the individual whose name follows is the owner of the business. *Id.* In reaching its conclusion, the *Southern Ins.* court noted that “doing business as” does not create an entity distinct from the individual. 442 F. Supp. at 31–32 (quoting *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381, 1387 (D. Neb. 1977)). According to *Southern Ins.*, the person acting as a sole proprietor, under one or several names remains one person, and is personally liable for his obligation. *Id.* (quoting *Duval*, 425 F. Supp. at 1387). Accordingly, the district court held Moore individually liable under the agreement. *Id.* at 32.

²⁴ 467 So. 2d 1301 (La. Ct. App. 1985).

²⁵ *McKendall*, 467 So. 2d at 1303.

²⁶ *Id.*

²⁷ *Pedersen*, 397 Mass. at 691, 493 N.E.2d at 487 (citing *Stern v. Lieberman*, 307 Mass. 77, 81, 29 N.E.2d 839, 842 (1940)).

sufficient evidence allowed the Court to determine Leahy had not signed in the capacity of an agent.²⁸ The Court also found support for its decision in *William Gilligan Co. v. Casey*, where the Supreme Judicial Court ruled that a corporation or person may be known under different names, and that contracts entered into under such names are equally binding on the individual or corporation.²⁹ Thus, based upon the Court's interpretation of a d/b/a signature and the Court's acceptance of a corporation's or an individual's ability to contract under more than one name, the Court found Leahy personally liable on the purchase and sale agreement.

After resolving the issue of personal liability, the *Pedersen* Court addressed whether an "acceptance of deed" provision foreclosed the plaintiffs from bringing an action based upon the construction duties of the seller. Generally, acceptance of a deed discharges the contractual duties of the seller.³⁰ The Court ruled that under the circumstances of this case, however, the "acceptance of deed" clause did not bar the action.³¹ The Court examined two earlier Massachusetts cases, *McMahon v. M & D Builders, Inc.*³² and *Pybus v. Grasso*³³ in making this determination.

The *Pedersen* Court began its analysis by noting that courts have interpreted the "acceptance of deed" clause as discharging the seller's obligations in matters concerning title but not to problems concerning home construction.³⁴ On this point the Court relied on its ruling in *McMahon*,³⁵ which provided that an acceptance of deed clause applied only to the real estate conveyed.³⁶ The *McMahon* Court reasoned that

²⁸ *Id.* (citing *Bissonette v. Keyes*, 319 Mass. 134, 136, 64 N.E.2d 926, 927 (1946)).

²⁹ *William Gilligan Co. v. Casey*, 205 Mass. 26, 31, 91 N.E. 124, 124-25 (1910).

³⁰ *M. PARK & D. PARK, REAL ESTATE LAW*, vol. 28A MASS. PRACTICE SERIES § 963 (2d ed. 1981). This general rule is often called the doctrine of merger. *McMahon v. M & D Builders, Inc.*, 360 Mass. 54, 59, 271 N.E.2d 649, 652 (1971). The merger doctrine expresses the idea that the provisions of the purchase and sale agreement are merged into the deed, and upon acceptance of the deed all contractual duties of the seller are discharged.

³¹ *See Pedersen*, 397 Mass. at 691-92, 493 N.E.2d at 487.

³² 360 Mass. 54, 271 N.E.2d 649 (1971).

³³ 317 Mass. 716, 59 N.E.2d 289 (1945).

³⁴ *See Pedersen*, 397 Mass. at 691, 493 N.E.2d at 487.

³⁵ *Id.* (citing *McMahon*, 360 Mass. at 59-60, 271 N.E.2d at 653).

³⁶ *McMahon*, 360 Mass. at 60, 271 N.E.2d at 653. In *McMahon*, the plaintiff homebuyers sought to rescind their purchase of a house and lot, on the basis of false and fraudulent representations and breach of implied warranties by the seller. *Id.* at 55, 271 N.E.2d at 650. In the contract between the buyer and seller, there was a deed of acceptance clause which provided:

If the seller shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereunto shall cease. *The acceptance of a deed by the Buyer shall be deemed to be a full performance and discharge hereof* (emphasis supplied).

Id. at 59, 271 N.E.2d at 652. The plaintiffs in *McMahon*, argued that such a clause was not a bar to relief. *Id.*

the general rule, discharging contractual duties, only precluded the buyer from raising a claim regarding the title conveyance.³⁷ In construing the clause involved in *Pedersen*, which was similar to that in *McMahon*,³⁸ the *Pedersen* Court relied on *McMahon* to find that such an acceptance of deed clause was inapplicable to disputes over matters concerning the construction of a house.³⁹

The *Pedersen* Court further supported its ruling by stating an exception to the general rule that acceptance of the deed discharged all duties of the seller. It noted that promises in addition to the title delivery — and which do not conflict with the deed — are an exception to the general rule.⁴⁰ This proposition is derived from the 1945 Supreme Judicial Court decision of *Pybus v. Grasso*.⁴¹ Relying on the exception announced in *Pybus*, the *Pedersen* Court held that Leahy's promised additional work was collateral to the delivery of the title and, therefore, beyond the scope of the "acceptance of deed" clause.

Having concluded that the "acceptance of deed" clause did not foreclose the plaintiffs' action, the *Pedersen* Court considered whether the defendant's liability was limited to the \$750 placed in escrow. The Court ruled that the money placed in escrow pending the completion of work on the house was not a liquidated damages clause. Damages, therefore, were not limited to the \$750 placed in escrow.⁴² The Court reasoned that

³⁷ *McMahon*, 360 Mass. at 60, 271 N.E.2d at 653. The Court stated that such a clause was "applicable only to the title to the real estate which was to be conveyed, and that the plaintiffs' acceptance of the deed operated as a merger or waiver only to the extent of precluding any claim that the title which the defendant conveyed did not satisfy the requirements of the agreement." *Id.*

³⁸ See *supra* note 13 for the wording of the acceptance of deed clause.

³⁹ See *Pedersen*, 397 Mass. at 691, 493 N.E.2d at 487.

⁴⁰ *Id.* at 691–92, 493 N.E.2d at 487.

⁴¹ 317 Mass. at 716, 59 N.E.2d at 287. In *Pybus*, the Court, in dicta, noted an exception to the general rule, that acceptance of the deed discharges the contractual duties of the seller. The exception provided that collateral or additional promises to the main promise of conveyance, which are not inconsistent with the deed, may be enforced after the deed is accepted. *Pybus*, 317 Mass. at 719, 59 N.E.2d at 291. In *Pybus*, the plaintiff contracted for a parcel of land with a building situated on it. *Id.* at 716, 59 N.E.2d at 290. The defendant delivered a quitclaim deed of "lot numbered 37." *Id.* at 717, 59 N.E.2d at 290. A survey later determined that part of the building contracted for was on adjoining lot 39, not owned by the defendant. *Id.* The *Pybus* Court held that the plaintiff had no remedy on breach of the contract by the defendant. *Id.* at 717, 59 N.E.2d at 291. The *Pybus* Court further ruled that the exception to the merger doctrine was inapplicable to the facts of that case because holding the defendant liable would be inconsistent with the deed, which described only lot 37. *Id.* at 719, 59 N.E.2d at 292.

⁴² *Pedersen*, 397 Mass. at 692, 493 N.E.2d at 487–88. The Court stated the agreed facts surrounding the escrow agreement: "'At the time of the closing . . . , the promises which are the subject of this action were not completed and an amount of \$750.00 was agreed upon to be held back, in escrow, with Robert Wilson, Esquire, buyers' attorney, pending completion of the work.'" *Id.* at 692, 493 N.E.2d at 487.

because the escrow agreement did not indicate a ceiling on the defendant's liability, the defendant's argument that the escrowed money acted as a liquidated damages clause failed.⁴³ Accordingly, because the Court found the defendant personally liable on the d/b/a signature, and because liability was not limited to the amount placed in escrow, the Supreme Judicial Court affirmed the lower court's award of damages in the amount of \$10,651.⁴⁴

The *Pedersen* case has important implications on contracts and agency law in Massachusetts. It is the first case in this jurisdiction to establish that because a personal signature followed by d/b/a is not a proper agency signature it can be binding on the individual.⁴⁵ The case also serves to clarify earlier case law in deciding that an "acceptance of deed" clause is not applicable to construction problems arising separately from title matters.⁴⁶ Finally, the *Pedersen* Court further clarified prior case law by ruling that an escrow agreement, with no indication that it was meant as a liquidated damages clause, does not operate as a limit on the seller's liability.⁴⁷

The Supreme Judicial Court's finding Leahy personally liable on the d/b/a signature comports with established notions of agency law and corporate signatures. The corporate signature is intended to do two things: place responsibility on the principal and avoid personal liability of the agent.⁴⁸ The standard corporate signature achieves both of these goals. It designates the corporate entity as the signatory party and indicates the actual person signing does so in an agency capacity.⁴⁹ It is clear from the signature in the *Pedersen* case that the document did not indicate the corporate entity as the signatory party, nor Leahy's capacity as an agent of the corporation.

Furthermore, the Court recognized the ability of a corporation or an individual to contract under more than one name.⁵⁰ As a result, Leahy's personal liability reflects the notion that a party can contract under more than one name. Leahy's signature on the purchase and sale agreement

⁴³ *Id.* at 692, 493 N.E.2d at 487–88.

⁴⁴ *Id.* at 692, 493 N.E.2d at 488.

⁴⁵ See *supra* notes 19–29 and accompanying text for a discussion of d/b/a signatures.

⁴⁶ See *supra* notes 30–41 and accompanying text for a discussion of "acceptance of deed" clauses.

⁴⁷ See *supra* notes 42–43 and accompanying text for a discussion of escrow arrangements.

⁴⁸ PEAIRS, *supra* note 3, at § 487.

⁴⁹ *Id.* A standard corporate signature would be:

"X Corporation

by _____

A.B., Treasurer"

Id.

⁵⁰ *Gilligan Co.*, 205 Mass. at 31, 91 N.E. at 124–25.

indicated that he did business under the name of Neponset Valley Builders Inc., and thus, the Supreme Judicial Court's decision consistently applied general notions of agency and contract law.

In adopting a rule which creates personal liability for d/b/a signatures, the Court emphasized the importance of adhering to the requirements of an agency signature. The *Pedersen* Court's holding clearly indicates that a signature which gives the impression of being signed in a personal capacity, and which does not follow the general requirements of a corporate signature may attach personal liability. Accordingly, practitioners should not use d/b/a signatures when the intent is to bind the corporate entity and to free the individual agent of any personal liability. If the individual intends to sign as an agent of the corporation, he or she should employ the usual corporate signature, which designates the corporation as the signatory party, and indicates the agency capacity of the individual signing.

The *Pedersen* decision is also important because it clarifies the implications of "acceptance of deed" clauses with respect to home buyers. The *Pedersen* Court elaborated upon the exception to the merger doctrine enunciated in *Pybus*, that promises which are additional or collateral to the conveyance of land are not necessarily merged into the deed.⁵¹ The Court found that the seller's duty to complete work on the *Pedersen* house survived even after the buyer had accepted the deed.⁵² This decision indicates, at least with regard to the sale of houses, that the Court views final construction work and finishing touches as "additional or collateral" to the title conveyance. The Court's position protects consumers by ensuring that vendors complete the house in a promised or warranted condition. This ruling implies that closing does not relieve builders of their construction obligations. Rather, the duty may continue beyond acceptance of the deed.

Finally, the *Pedersen* Court found that the \$750 placed in escrow did not act to liquidate damages.⁵³ The Court held that the escrow arrangement did not sufficiently indicate intent to make the agreement a liquidated damages clause.⁵⁴ The Court's decision implies that escrow agreements are not per se liquidated damages clauses. Rather, the parties must explicitly demonstrate that they intended the escrow agreement to function as a liquidated damages clause. The *Pedersen* case indicates the Court's unwillingness to infer such an intention unless explicitly demonstrated. Thus, parties intending to make an escrow arrangement into

⁵¹ *Pybus*, 317 Mass. at 719, 59 N.E.2d at 291.

⁵² See *Pedersen*, 397 Mass. at 691–92, 493 N.E.2d at 487. See *supra* notes 30–41 and accompanying text for a discussion of the merger doctrine and its exception.

⁵³ *Id.* at 692, 493 N.E.2d at 487–88.

⁵⁴ *Id.*

a liability cap or liquidated damages clause should state so clearly in the escrow agreement.

The *Pedersen* case is an important decision in Massachusetts' agency and contract law. It determined for the first time that use of d/b/a in corporate signatures could impose personal liability. The case also clarified the exception to the merger doctrine, and thereby established that a duty to do construction work on a house survives the buyer's acceptance of the deed. Finally, the case illustrates the Court's unwillingness to infer a limit on liability or a liquidated damages clause from an escrow arrangement when the requisite intent is lacking.

§ 1.2. Incorporation of a General Contract's terms in a Subcontract.*

Since 1911, the Massachusetts courts have held fast to the view that the terms of a general contract will only be incorporated in a subcontract by appropriate language in the subcontract referring to the general contract.¹ The general contract cannot be read into a subcontract by implication.² From 1911 to the present, the Massachusetts courts have repeatedly considered and upheld this rule.³ During the *Survey* year, in *Chicopee Concrete Serv. v. Hart Engineering*, the Supreme Judicial Court reaffirmed this rule.⁴ The Court, however, added to the law in this area by addressing two other issues.⁵

In *Chicopee*, the defendant, general contractor, Hart Engineering (Hart), submitted a bid for a contract to construct a waste water treatment plant to the city of Holyoke.⁶ Hart, in preparing its bid for the general contract, requested a subcontract bid for the sale of cement from Chicopee Concrete Service (Chicopee).⁷ Chicopee quoted its prices by letter to Hart, which used these prices in calculating its bid for the general contract.⁸

* Joseph A. DiBrigida Jr., staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.2. ¹ *Soley & Sons v. Jones*, 208 Mass. 561, 566–67, 95 N.E. 94, 94 (1911).

² *Id.*

³ See *Farm-Rite Implement v. Fenestra, Inc.*, 340 Mass. 276, 281, 163 N.E.2d 285, 289–90 (1960), *rev'd*, 342 Mass. 427, 431, 173 N.E.2d 636, 639 (1961); *Vappi & Co. v. Sullivan*, 331 Mass. 463, 466–67, 120 N.E.2d 203, 205 (1954).

⁴ 398 Mass. 476, 478, 498 N.E.2d 121, 122 (1986).

⁵ In *Chicopee*, the Court also held that in the absence of a statute rejecting incorporation by general reference, incorporation by a clearly stated general reference is sufficient. *Id.* In dicta, the Court further stated that if Chicopee knew or had notice of the clause which Hart sought to incorporate, Chicopee might have been bound by that clause. *Id.* at 478–79, 498 N.E.2d at 122.

⁶ 20 Mass. App. Ct. 315, 315, 479 N.E.2d 748, 748 (1985).

⁷ *Id.* at 316, 479 N.E.2d at 748.

⁸ *Id.*

Hart, by letter, confirmed its intention to award Chicopee the subcontract for concrete⁹ but conditioned the award of the subcontract upon receipt of a formal general contract from the city.¹⁰ Hart's letter directed Chicopee's attention to the "Contract & General Conditions, Supplementary General Conditions, Special Conditions, Information for Bidders, and the Technical Specifications" sections of the general contract to be awarded by the city.¹¹ The letter stated that these sections would be made part of Chicopee's subcontract, and also specifically cautioned Chicopee to comply with all requirements of "Nondiscrimination in Employment and the President's Executive Order 11246."¹²

The city awarded Hart the general contract.¹³ The general conditions of the contract to be awarded by the city contained an owner-approval clause providing that no subcontracts could be awarded unless approved by the city's engineering firm, Tighe & Bond/SCI (Tighe).¹⁴ Hart then sent to Chicopee its subcontract which stated that Chicopee was to furnish all materials and equipment according to the specifications, terms and conditions of the city's engineering firm, Tighe.¹⁵ Chicopee signed

⁹ One of the issues not appealed to the Supreme Judicial Court was whether a contract existed between Chicopee and Hart. *Id.* at 317–19, 479 N.E.2d at 749–50. The Appeals Court concluded that Hart's purchase order to Chicopee constituted a valid contract. *Id.* at 318, 479 N.E.2d at 750. Because the Hart-Chicopee contract was the subcontract, "purchase order" and "subcontract" will be used synonymously throughout this chapter.

¹⁰ *Id.* at 316, 479 N.E.2d at 748–49. Chicopee expanded its facilities and purchased new equipment in anticipation of the purchase order. *Id.* at 317, 479 N.E.2d at 749.

¹¹ *Id.* at 316, 479 N.E.2d at 749.

¹² *Id.* The Appeals Court had found support for its holding in the fact that the part of the general contract that was not particular to the work Chicopee was to perform was incorporated in the purchase order by specific reference: "You are specifically cautioned to fully comply with all the requirements pertaining to Nondiscrimination in Employment and the President's Executive Order 11246 and amendments." 20 Mass. App. Ct. at 321, 479 N.E.2d at 751. The Court found that specific reference to these requirements did not support the Appeals Court's conclusion because under 29 C.F.R. § 5.5(a)(6) (1986) these requirements cannot be incorporated by reference to contract documents. 398 Mass. at 478 n.1, 498 N.E.2d at 122 n.1.

¹³ *Id.* at 317, 479 N.E.2d at 749.

¹⁴ *Id.* at 315–16, 479 N.E.2d at 748. Such a clause is referred to as an "owner-approval" clause because the owner of the project and land, the city, retains the power to approve or disapprove any proposed subcontractors. In this case, the city authorized its engineering firm to exercise this power.

¹⁵ *Id.* at 317, 479 N.E.2d at 749. The pertinent part of the subcontract stated that Chicopee was to: "Furnish all materials and equipment to perform the 'SCOPE OF WORK' hereto attached in strict accordance with plans and specifications entitled 'Holyoke Wastewater Treatment Plant Improvements' . . . as prepared by Tighe & Bond/SCI, including all drawings listed therein . . . General Terms & Conditions, codes, and other publications referred to therein." *Id.*

the subcontract.¹⁶ After the engineering firm rejected Chicopee,¹⁷ Hart withdrew the subcontract.¹⁸

Chicopee brought an action for breach of the subcontract against Hart.¹⁹ The superior court judge found that the contract between Chicopee and Hart was subject to the approval of the city's engineering firm, Tighe.²⁰ The court therefore held that Hart's withdrawal of the subcontract, prompted by the engineering firm's disapproval of the subcontract with Chicopee, was not a breach of the subcontract.²¹ The Appeal's Court reversed, finding that the owner-approval clause of the general contract was not incorporated in the Hart-Chicopee subcontract.²² The Supreme Judicial Court upheld the Appeals Court decision reversing the superior court judgment.²³

On the appeal of *Chicopee* from the intermediate court, the Supreme Judicial Court, in a brief opinion, upheld the reasoning and holding of the Appeals Court.²⁴ Whether Hart's withdrawal of its subcontract to Chicopee constituted a breach of the Hart-Chicopee subcontract rested on whether the subcontract incorporated the owner-approval clause of the general contract.²⁵ In the Appeals Court, Hart contended that three specific clauses of the general contract required that subcontracts be approved by the city's engineering firm and that these clauses were incorporated into the subcontract by reference in the subcontract.²⁶ First, Hart pointed to paragraph G of the "Proposal Form for Sub Bid" which provided that the subcontractor agree to be bound to the general contractor by the general conditions of the plans and specifications and to assume toward the general contractor all the obligations and responsibilities owed to the owner.²⁷ Hart further directed the court's attention to article 58 of the "General Requirements" and paragraph HH of the "Special Provisions" which provided that the general contractor may not subcontract any work without the owner's prior written approval.²⁸

The Appeals Court rejected Hart's contention, holding that only by

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 316, 479 N.E.2d at 748.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 398 Mass. at 479, 498 N.E.2d at 123.

²⁴ *Id.* at 477, 498 N.E.2d at 122.

²⁵ 20 Mass. App. Ct. at 319, 479 N.E.2d at 750.

²⁶ *Id.* at 319-20 n.5, 479 N.E.2d at 750 n.5.

²⁷ *Id.*

²⁸ *Id.*

unambiguous and appropriate language in the subcontract could the owner-approval clause or the general contract in its entirety be incorporated.²⁹ Relying on the Supreme Judicial Court's decisions in *Vappi & Co. v. Sullivan*,³⁰ and *Soley & Sons v. Jones*,³¹ the Appeals Court found that in the absence of such reference, only terms relating to the work to be done are impliedly incorporated into the subcontract by general reference.³² Notwithstanding the reference in the subcontract to the "General Terms & Conditions," and hence article 58 of the "General Requirements" and paragraph HH of the "Special Provisions," the court did not

²⁹ *Id.* at 320, 479 N.E.2d at 750–51.

³⁰ 331 Mass. 463, 120 N.E.2d 203 (1954).

In *Vappi*, the plaintiff, general contractor (Vappi) entered into a general contract with a landowner to build a shopping center. *Id.* at 463, 120 N.E.2d at 203. The general contract contained several provisions requiring the contractor to protect the property from damage during the course of the work and to pay for damages in certain instances. *Id.* at 464, 120 N.E.2d at 203–04. Vappi then contracted with the defendant, subcontractor (Sullivan), for work to be done according to the architect's plans and specifications as stated in the general contract. *Id.* at 464–65, 120 N.E.2d at 204.

During the course of its work, Sullivan caused damage to the property. *Id.* at 465, 120 N.E.2d at 204. When Vappi notified Sullivan that it was Sullivan's responsibility to pay for the property damage, Sullivan refused. *Id.* Vappi made the repairs at its own expense and brought suit to recover the cost of those repairs from Sullivan. *Id.* at 465–66, 120 N.E.2d at 204. The Court held that when a subcontractor contracts to do work according to the plans and specifications of the general contract, these plans and specifications are read into the subcontract by implication. *Id.* at 466–67, 120 N.E.2d at 205. The subcontractor, therefore, steps into the shoes of the general contractor and assumes the general contractor's obligations with respect to that particular part of the work to be performed. *Id.* at 466–67, 120 N.E.2d at 205.

³¹ 208 Mass. 561, 95 N.E. 94 (1911). In *Soley*, the defendant, general contractor (Jones), entered into a contract with the city of Boston for the construction of a tunnel. 208 Mass. at 562, 95 N.E. at 94. This general contract contained a provision allowing the city to cancel the contract if the city's engineer determined that the contractor was not making such progress that the work would be completed on time. *Id.* at 566, 95 N.E. at 94. Jones then contracted with the plaintiff, subcontractor (Soley), to perform work in a careful and workmanlike manner and according to the orders of the Boston Transit Commission. *Id.* at 563, 95 N.E. at 94. When the commission terminated the city's contract with Jones, Soley ceased working and brought suit against Jones for the contract price. *Id.* at 562–63, 95 N.E. at 94.

Jones contended that when construed in connection with the circumstances, a condition that the subcontract was dependent upon the continued existence of the general contract could be implied or was an unexpressed term of the subcontract. *Id.* at 566, 95 N.E. at 94. In rejecting Jones' contention, the Court held that the general contract in its entirety would have been incorporated into the subcontract if the general contract had been referred to by appropriate language. *Id.* Where only that part of the general contract pertinent to the subcontractor's performance may be implied and the language is clear, the general contract may not be read into the subcontract by implication. *Id.* at 566–67, 95 N.E. at 94.

³² 20 Mass. App. Ct. at 320, 479 N.E.2d at 750–51.

find the required cross-reference to relevant documents needed to incorporate anything other than the terms of the general contract that were relevant to the work to be performed by Chicopee.³³

Citing with approval to the Appeals Court opinion, the Supreme Judicial Court found that the terms of the general contract were not incorporated in the subcontract by the language in the subcontract.³⁴ The Court held that the subcontract incorporated by general reference only those terms of the general contract that referred to the work Chicopee was to perform.³⁵ The Court, therefore, affirmed the Appeals Court decision.³⁶ To this extent, the Court's decision agreed with prior law in this area.³⁷

The Supreme Judicial Court did, however, consider and decide two issues which added to the prior law.³⁸ First, although the Court agreed with the Appeals Court that the terms of a general contract could be fully incorporated into the subcontract by appropriate reference, the Court refused to adopt the interpretation urged by the *amicus curiae*.³⁹ The Associated General Contractors of Massachusetts, in an *amicus* brief, argued that the Appeals Court opinion should be interpreted as announcing a rule that a provision of a general contract can be included in a subcontract only if specifically referred to as a condition of the subcon-

³³ *Id.* at 320, 479 N.E.2d at 751.

In so finding, the Appeals Court in *Chicopee* relied on a Connecticut decision, *Raff Co. v. Murphy*, 110 Conn. 234, 147 A. 709 (1929). In *Raff*, the plaintiff, general contractor (Raff), requested a bid from the defendant, subcontractor (Murphy), for plumbing work. *Id.* at 236–37, 147 A. at 710. Murphy submitted the bid. *Id.* at 237, 147 A. at 710. Raff incorporated this bid in the bid it submitted on the general contract. *Id.* at 237, 147 A. at 710–11.

Raff advised Murphy that it would notify Murphy upon receipt of formal notice of the award of the contract. *Id.* at 237, 147 A. at 711. Two days later, Murphy informed Raff that because of an error it had made in calculating its bid, Murphy could not go through with the contract. *Id.* Raff was then awarded the general contract, which contained a provision requiring the contractor to obtain the written consent of the state's engineers before subcontracting any work. *Id.* at 238, 147 A. at 711. Raff never obtained such permission. *Id.* at 238–39, 147 A. at 711. Murphy did not perform the contract and Raff had to pay a second subcontractor \$4200 more for the work than Murphy's bid. *Id.* at 238, 147 A. at 711. Raff brought an action against Murphy to recover damages for breach of contract. *Id.* at 235, 147 A. at 710. The Connecticut Supreme Court found that the provision in the general contract requiring the consent of the state's engineers to the subcontract was not made an express condition of the subcontract. *Id.* at 240, 147 A. at 711–12. Furthermore, it found no facts which would incorporate the general contract provision in the subcontract by implication. *Id.* at 240, 147 A. at 712.

³⁴ *Id.* at 477–78, 498 N.E.2d at 122.

³⁵ *Id.* at 478, 498 N.E.2d at 122.

³⁶ *Id.* at 479, 498 N.E.2d at 123.

³⁷ See *supra* notes 30, 31, 33 and accompanying text.

³⁸ 398 Mass. at 478–79, 498 N.E.2d at 122–23.

³⁹ *Id.* at 478, 498 N.E.2d at 122.

tract.⁴⁰ The Court rejected this argument, holding that unless some statute rejects incorporation by general reference, incorporation by a clearly stated general reference is sufficient.⁴¹ The Court thus explicitly validated incorporation by general reference.⁴²

Second, the Court, finding no genuine issue as to any material fact, upheld the Appeals Court order of summary judgment to Chicopee on the question of Hart's liability.⁴³ In so doing, the Court held that if the superior court had granted Chicopee's motion for summary judgment based on the material before that court, the Appeals Court was fully warranted in ordering summary judgment when faced with the same record.⁴⁴ Such a finding did not change prior law.⁴⁵ The Court added to prior law, however, when it stated in dicta that if Chicopee knew or had notice of the owner-approval clause, Hart might survive Chicopee's summary judgment motion.⁴⁶ In such a situation, Chicopee might be bound by the clause despite the fact that the clause was not incorporated by reference.⁴⁷ Hart did not make such an argument in the trial court.⁴⁸ Nevertheless, the Supreme Judicial Court stated that if Chicopee did have knowledge or notice of the owner-approval clause, the Court would consider such an argument, even though Hart did not raise and the superior court judge did not deal with the issue.⁴⁹ Finding that the record did not support such an argument, the Court upheld the summary judgment award.⁵⁰

Thus, under the current state of Massachusetts law, a provision of a general contract will be included in a subcontract even if not specifically referred to in the subcontract. If the general contract is to be incorporated by general reference, however, the reference must be "clearly stated." As the Court has shown, it considers this standard to be very high, and will strictly construe the language of the contracts. The reference to either the general contract in its entirety or to the particular provision of the general contract sought to be incorporated in the subcontract must be unambiguous. Furthermore, the language must refer to more than just the terms of the general contract that are pertinent to the work to be performed by the subcontractor for the general contractor. Moreover,

⁴⁰ *Id.* at 477–78, 498 N.E.2d at 121–22.

⁴¹ *Id.* at 478, 498 N.E.2d at 122.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See 6 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 56.27[2] (2d ed. 1985).

⁴⁶ 398 Mass. at 478–79, 498 N.E.2d at 122.

⁴⁷ *Id.*

⁴⁸ *Id.* at 478, 498 N.E.2d at 122.

⁴⁹ *Id.* at 479, 498 N.E.2d at 122.

⁵⁰ *Id.*

even if the portion of the general contract sought to be incorporated into the subcontract is not incorporated, the general contractor may survive a motion for summary judgment by presenting evidence establishing that the subcontractor had knowledge or notice of the clause in question.

The standard upheld by the Court in *Chicopee* is appropriate because it encourages precise and careful drafting of contracts. Because it promotes precise drafting, the standard benefits all parties concerned. The general contractor and subcontractor will know the exact terms of their respective contracts and will not resort to litigation as a means of contract interpretation. Such a standard will, therefore, also benefit the judicial system by eliminating litigation that could have been avoided through careful draftsmanship. The result will be an easing of the burden on the courts.

The standard followed by the Court in *Chicopee* therefore carries important drafting caveats for the practitioner. Wherever possible, subcontracts should be drafted with specific reference to the provisions of the general contract sought to be incorporated. If the desire is to incorporate the entire general contract, it may be accomplished by general reference so long as the language is unambiguous. Furthermore, any reference to the general contract should refer to more than the work to be done by the subcontractor for the general contractor or the attempt at incorporation will fail. If the reference relates back to portions of the general contract dealing with the general contractor's obligations to the owner, or to specific owner-approval clauses, the incorporation attempt stands a better chance.

In conclusion, courts in Massachusetts have historically applied a high standard when judging whether the terms of a general contract have been incorporated by reference into a subcontract. Furthermore, the courts have strictly construed the language of such contracts. The Supreme Judicial Court's decision in *Chicopee* indicates that the Court intends to continue to apply this high standard. The Court's refusal to lower its traditionally high standards for judging incorporation creates an incentive for counsel to draft subcontracts carefully and unambiguously to ensure that the provisions of the general contract sought to be incorporated in the subcontract will be construed by the courts as incorporated.

§ 1.3. Vicarious Liability for Multiple Damages Under Chapter 93A.* Massachusetts courts have applied the Consumer Protection Act¹ in a wide variety of business and trade contexts² to remedy unfair or deceptive

* James P. Hawkins, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 1.3. ¹ G.L. c. 93A (1984 ed.).

² See, e.g., *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 489 N.E.2d 185 (1986) (promotor of data communications trade show recovered for misrepresentations

trade practices.³ Section 11 of the Act provides for private actions and allows the court to award multiple damages to victims of wilful or knowing violations.⁴ While businesses or corporations often have been charged with such intentional violations,⁵ the courts have never considered a company's liability for multiple damages where the unfair or deceptive dealing with the victim was negligent, but induced by an employee's wilful misconduct.

The alleged victim of an unfair or deceptive trade practice must prove three elements to recover multiple damages under the Act.⁶ First, he or she must establish that the conduct in question constitutes an unfair or deceptive trade practice.⁷ Second, he or she must prove that the violation

by competing promotor regarding the latter's possession of magazine circulation list and use of litigation as a marketing weapon against the recovering promotor); *Service Publications, Inc. v. Gorman*, 396 Mass. 567, 487 N.E.2d 520 (1986) (purchaser of magazine subscription business recovered for seller's misrepresentations and information withholdings in negotiating the sale); *Linthicum v. Archimbault*, 379 Mass. 381, 398 N.E.2d 482 (1979) (owner of residential rental property recovered for breach of warranty by roofing contractor); *Wasserman v. Agnastopolous*, 22 Mass. App. Ct. 672, 497 N.E.2d 19 (1986) (lessee, who operated a restaurant on the leased premises recovered damages against lessor for conduct which resulted in termination of agreement to sell business to third party). See also *Lantner v. Carson*, 374 Mass. 606, 610–12, 373 N.E.2d 973, 976–77 (1978), for a discussion of the factors in determining whether a private individual's isolated transaction falls within the "business context" under § 11 of the Act. The relevant circumstances include the nature of the transaction and the character of the parties involved. *Id.* at 610, 373 N.E.2d at 976.

³ G.L. c. 93A, § 2(a) defines the scope of the chapter by stating, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

⁴ G.L. c. 93A, § 11 (1984 ed.) reads, in relevant part:

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property . . . as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two . . . may . . . bring an action . . . for damages and such equitable relief . . . as the court deems necessary and proper. . . . [M]oney damages . . . may include double or treble damages, attorneys' fees and costs.

If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice was a wilful or knowing violation of said section two.

⁵ See *supra* note 2 for cases in which the chapter 93A, § 11 plaintiff or counterclaimant alleged wilful or knowing violations of the Act and sought multiple damages.

⁶ See *Wang Laboratories, Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 859, 501 N.E.2d 1163, 1166 (1986).

⁷ See *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915 (1975). In *PMP*, the Supreme Judicial Court accepted the Federal Trade Commission's standards for determining whether a trade practice is unfair. *Id.* at 596, 321 N.E.2d at 917–18. The FTC considerations which the Court adopted include whether the practice: (1) is

was wilful or knowing.⁸ Finally, the victim needs to demonstrate actual damages which have resulted from the violative conduct.⁹

Where the victim brings suit under the multiple damage provision against a business rather than an individual, and the violations have been committed by an employee of the business, the courts apply the doctrine of respondeat superior to determine the company's liability.¹⁰ Under the respondeat superior doctrine, an employer is liable for the tortious conduct of its employee if performed within the scope of employment.¹¹ To fall within the scope of employment, the employee's conduct must be of the type he is employed to perform,¹² it must take place within the space and time limits which the employer has established,¹³ and it must be at least partially intended to serve the employer's interests.¹⁴ Applying the respondeat superior doctrine, the courts have found violations of the Act by business entities and have awarded multiple damages for an employee's wilful or knowing violations.¹⁵

The policy underlying chapter 93A is to encourage honest business practices and to protect consumers from unfair or deceptive dealings.¹⁶

within the penumbra of "common-law, statutory or other established concept of unfairness," (2) "is immoral, unethical, oppressive or unscrupulous;" and (3) "causes substantial injury to consumers (or competitors or other businessmen)." 29 Fed. Reg. 8325, 8355 (1964). The FTC regulations state that if each of the three factors is present and the conduct is "exploitive or inequitable" and "seriously detrimental" to consumers or others as well as "morally objectionable," the practice is unfair. *Id.*

⁸ See *Computer Systems Eng'g, Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1373-76 (D. Mass. 1983), *aff'd*, 740 F.2d 59 (1st Cir. 1984), for a thoughtful discussion of the "wilful or knowing violation" element.

⁹ See *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 800-01, 343 N.E.2d 375, 379 (1976). The victim can only recover for losses which were a foreseeable consequence of the unfair practice. *Id.* at 801, 343 N.E.2d at 379.

¹⁰ It is well recognized under principles of general corporate law that an employer will be held liable for the actions of an employee taken within the scope of employment. See PROSSER & KEETON, *THE LAW OF TORTS* § 70 (5th ed. 1984); 57 C.J.S. *Master and Servant* § 555 (1948); see also *Shaw v. Rodman Ford Truck Center, Inc.*, 19 Mass. App. Ct. 709, 712, 477 N.E.2d 413, 415 (1985) (employer held liable for conduct of salesman and sales manager).

¹¹ 57 C.J.S. *Master and Servant* § 555 (1948). See *Douglas v. Holyoke Machine Co.*, 233 Mass. 573, 576, 124 N.E. 478, 479 (1919).

¹² See *infra* note 39.

¹³ See *infra* note 40.

¹⁴ See *infra* note 41.

¹⁵ Compare *Shaw*, 19 Mass. App. Ct. at 712, 477 N.E.2d at 415 (company held liable for double damages where defendant's salesman and sales manager found to have committed unfair trade practices in misrepresenting the condition of a used truck to the plaintiff-buyer) with *Wasserman*, 22 Mass. App. Ct. 672, 497 N.E.2d 19 (only single damages awarded under § 11 where property owner unintentionally interfered with lessee's sale of business to prospective lessee).

¹⁶ See *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 624, 382 N.E.2d 1065, 1069

The multiple damage provisions penalize wilful violations more severely than negligent or unintentional violations, thereby deterring unscrupulous practices. The availability as well as the amount of additional damages depends on the degree of the violator's culpability.¹⁷ Imputing multiple damage liability onto companies for their employees' intentional misconduct promotes this policy by encouraging businesses to supervise and control their employees' practices. Without the threat of vicarious liability, companies could remain ignorant of their employees' conduct, reap the profits of their work, yet disclaim liability for violative acts.

During the *Survey* year, in *Wang Laboratories, Inc. v. Business Incentives, Inc.*,¹⁸ the Supreme Judicial Court encountered a new problem in the application of agency principles to unfair trade practice cases. A unanimous Court found Wang liable for multiple damages under the Act where an employee's intentional conveyance of misinformation induced the company executives to violate the Act.¹⁹ Wang did not appeal the lower court's determinations that its conduct constituted an unfair or deceptive trade practice or that its conduct had damaged the opposing party in the amount which the court awarded. However, because the executives' act was negligent rather than intentional, the company argued that it should only be liable for single damages.²⁰ Without knowing or intentional misconduct by the violator, the victim is entitled to recover only his actual damages.²¹ The Court applied the respondeat superior doctrine to the intent question, imputed the employee's bad faith to the company and held the company liable for multiple damages.²²

The *Wang* case arose from the termination of a 1977 contract between Wang Laboratories, Inc. (Wang) and Business Incentives, Inc. (BI), under which BI was to identify and obtain tax savings for Wang.²³ BI's compensation was to be one-third of the resultant tax savings.²⁴ The contract did not contain a termination clause and extended through

(1978). *Heller* addressed a claim under chapter 93A, § 9, which protects consumers from unfair trade practices, involving a dissatisfied home buyer, but the same concerns underlie the so-called "businessman's" provisions in § 11. See generally *id.* at 621, 382 N.E.2d at 1065. See also *Manning v. Zuckerman*, 388 Mass. 8, 12, 444 N.E.2d 1262, 1264–65 (1983) (Court determined that disputes arising out of an employment relationship do not fall within the legislature's intended scope of c. 93A) and *infra* note 54.

¹⁷ See *Linthicum v. Archimbault*, 379 Mass. 381, 388, 398 N.E.2d 482, 487 (1979).

¹⁸ 398 Mass. 854, 501 N.E.2d 1163 (1986).

¹⁹ *Id.*

²⁰ See *id.* at 858, 501 N.E.2d at 1167.

²¹ See *Wasserman*, 22 Mass. App. Ct. at 680–81, 497 N.E.2d at 24; *Linthicum*, 379 Mass. at 388, 398 N.E.2d at 487.

²² *Wang*, 398 Mass. at 860–61, 501 N.E.2d at 1167.

²³ *Id.* at 855, 501 N.E.2d at 1164. The original contract was between Wang and Dudley L. Post, who subsequently incorporated his business as Business Incentives, Inc. *Id.*

²⁴ *Id.*

1983.²⁵ Prior to Wang's termination of the contract in 1981, BI allegedly performed the required services for the years 1977 through 1980.²⁶ At the time that Wang terminated the contract, it allegedly owed BI \$340,890.50 for services rendered.²⁷ Wang executives terminated the BI contract at the recommendation of Wang's junior manager of in-house tax affairs, who criticized BI's performance under the contract and suggested that Wang could avoid BI's fees by having current staff assume the work.²⁸

Wang initiated the suit in district court to recover for BI's alleged failure to utilize the tax savings program to Wang's full benefit and for violation of the Consumer Protection Act.²⁹ BI removed the case to superior court and counterclaimed for breach of contract, as well as multiple damages for alleged violation of the Act.³⁰ The superior court denied Wang's claims, and awarded single contract damages to BI on four of its seven counterclaims.³¹ The court held that Wang's junior manager of in-house tax affairs had wilfully interfered with BI's contractual relationship with Wang by erroneously and in bad faith reporting to his superiors that BI had failed to maximize Wang's tax savings.³² Relying on the junior manager's false and partially self-serving comments, Wang executives terminated the BI contract.³³

Under the respondeat superior doctrine, the court held that the Wang executives' termination of the BI contract constituted an unfair trade practice under the Consumer Protection Act, for which the company was liable.³⁴ The judge characterized the executives' conduct as negligent rather than wilful, however, and ruled that multiple damages were therefore not available under the damages section of the Act.³⁵

On direct appeal by BI, the only issue before the Supreme Judicial Court was whether the manager's wilful misrepresentations could be imputed to the Wang executives who relied on them, thereby making multiple damages available to BI.³⁶ The Supreme Judicial Court overruled the superior court decision and held that Wang had intentionally violated

²⁵ *Id.* at 856, 501 N.E.2d at 1164.

²⁶ *Id.* at 855, 501 N.E.2d at 1164.

²⁷ *See id.* at 856-57, 501 N.E.2d at 1164-65.

²⁸ *Id.* at 857, 501 N.E.2d at 1165.

²⁹ *Id.* at 855, 501 N.E.2d at 1164.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 857, 501 N.E.2d at 1165.

³³ *Id.*

³⁴ *Id.* at 857-58, 501 N.E.2d at 1165.

³⁵ *Id.* at 858, 501 N.E.2d at 1165. *See supra* note 4 for the pertinent text of G.L. c. 93A, § 11 (1984 ed.).

³⁶ *Wang*, 398 Mass. at 859, 501 N.E.2d at 1166.

the Act and that multiple damages were therefore appropriate.³⁷ The Court reasoned that the determinative factor was whether the manager's unfair acts were performed within the scope of his employment.³⁸ The Court enumerated three elements necessary to a finding of an employer's vicarious liability for the tortious conduct of its employees: the conduct must be of the kind the employee is engaged to perform,³⁹ it must occur substantially within the authorized time and space limits,⁴⁰ and it must be motivated at least partially by a purpose to serve the employer.⁴¹

Applying this vicarious liability to the facts of the case, the Court first rejected Wang's argument that the manager's acting on his own initiative in reviewing BI's performance took the conduct outside of the scope of the manager's duties.⁴² The Court determined that Wang executives repeatedly endorsed and relied upon the manager's appraisal of BI's work and involvement with the BI contract.⁴³ The Court thus concluded that the manager's criticism of BI's performance fell within the bounds of his employment.⁴⁴ These facts, the Court found, also satisfied the requirement that the conduct occur within the authorized time and space limits.⁴⁵

Applying the final test, motive to serve the employer, the Court noted that an employee's predominant motive of benefiting himself will not take the conduct outside the scope of employment if it is otherwise within his authority.⁴⁶ The Court recognized, however, that the manager's intent to advance his own interests within the corporation might remove the conduct from the scope of employment.⁴⁷ As the trial judge had found,

³⁷ *Id.* at 860–61, 501 N.E.2d at 1167.

³⁸ *Id.* at 859, 501 N.E.2d at 1166. *See* RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

³⁹ *Wang*, 398 Mass. at 859, 501 N.E.2d at 1166 (citing *Douglas v. Holyoke*, 233 Mass. 573, 576, 124 N.E. 478, 479 (1919)).

⁴⁰ *Id.* (citing *Vallavanti v. Armour & Co.*, 260 Mass. 417, 419–20, 157 N.E. 527, 528 (1927)). The Court appears to use “time and space limits” to refer to the hours and place of employment which the employer has established for the employee. *See id.* at 860, 501 N.E.2d at 1167.

⁴¹ *Id.* at 859, 501 N.E.2d at 1166 (citing *Donahue v. Vorenberg*, 227 Mass. 1, 5, 116 N.E. 246, 247 (1917); *McKeever v. Ratcliffe*, 218 Mass. 17, 20, 105 N.E. 552, 552–53 (1914)).

⁴² *Id.* at 860, 501 N.E.2d at 1167.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 859–60, 501 N.E.2d at 1166–67. *See* RESTATEMENT (SECOND) OF AGENCY § 236, comment b (1958). *See also* *U.S. v. Cincotta*, 689 F.2d 238, 241–42 (1st. Cir.), *cert. denied*, 459 U.S. 991 (1982)(employer held liable for employee's scheme to defraud government by inducing the government to pay for oil not delivered to the government, since employee was acting within the scope of his employment duties and was at least partially motivated to serve the company).

⁴⁷ *Wang*, 398 Mass. at 860, 501 N.E.2d at 1167.

however, the manager also sought to further Wang's interests.⁴⁸ The Court interpreted the trial judge's findings to mean that the manager had a dual motive: self-interest and cost avoidance for Wang.⁴⁹ The Court held the respondeat superior doctrine applicable where the employee acts out of partial motivation to serve the employer, and therefore held Wang liable under the Act for the manager's wilful misconduct.⁵⁰ The Court remanded the case to the superior court for assessment of damages between double and treble BI's actual damages resulting from the contract termination.⁵¹

The *Wang* Court properly reversed the trial court's multiple damage denial, but confused two independent issues in the process. The Court immediately addressed the application of the respondeat superior doctrine without discussing the appropriateness of an employer's vicarious liability for multiple damages under the Consumer Protection Act.⁵² Furthermore, the Court did not discuss the importance of the Wang executives' negligence to its award of multiple damages. Although the Court's straightforward application of agency rules suggests that the company's negligence was not a factor, the practitioner may wonder whether a company which innocently commits an unfair or deceptive trade practice will be subject to multiple damage liability as a result of an employee's wilful misconduct.⁵³

One of the policies behind the Consumer Protection Act is to deter dishonest business dealings.⁵⁴ The multiple damage provision of the Act

⁴⁸ *Id.* The trial court had ruled that Wang's junior in-house tax manager hoped to realize for Wang the benefits of the BI contract without cost or concern for Wang's contractual obligations. *Id.* at 857, 501 N.E.2d at 1165.

⁴⁹ *Id.* at 860, 501 N.E.2d at 1167.

⁵⁰ *Id.* at 860-61, 501 N.E.2d at 1167.

⁵¹ *Id.*

⁵² *Id.* The Court could have looked to its own edict from *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 626, 382 N.E.2d 1065, 1070 (1978), that the unfairness or deceptive-ness of trade practices is to be evaluated in light of the policy underlying the Act and from the case's inherent circumstances. The same approach should control the Court's analysis of the availability of multiple damages.

⁵³ Although the Court did not address this point specifically, the only logical conclusion to be drawn from the Court's holding is that the company executives' negligence was based either on a finding by the trial court or a concession by Wang that the executives knew or should have known, with reasonable diligence, that the contract termination constituted an unfair or deceptive trade practice.

⁵⁴ See *Manning v. Zuckerman*, 388 Mass. 8, 12, 444 N.E.2d 1262, 1264-65 (1983), where the Court stated:

The legislature originally enacted c. 93A to improve the commercial relationship between consumers and businessmen. By requiring proper disclosure of relevant information and proscribing unfair or deceptive acts or practices, the Legislature strove to encourage more equitable behavior in the marketplace. See *Commonwealth v. Decotis*, 366 Mass. 234, 238, 316 N.E.2d 748, 752 (1974). By the addition of § 11 by

is designed to penalize those who engage in unfair or deceptive trade practices.⁵⁵ The degree of the defendant's culpability controls the applicability and amount of multiple damages.⁵⁶ Thus, although negligence is not a defense to an unfair or deceptive trade practice claim, it does not give rise to a claim for multiple damages under the Act.⁵⁷ Multiple damages are a punitive element intended to deter wilful violations of the Act.⁵⁸

Subjecting companies to multiple damages for negligently relying on an employee's bad faith conduct partially calculated to serve the company furthers this policy of deterrence. It encourages business executives to scrutinize their employees' actions and to insist on good faith representations within the organization, at least where other individuals or businesses will be involved. A system which does not impose liability on employers for their employees' unfair or deceptive practices would not provide the desired deterrent.

A decision in Wang's favor on the multiple damage issue would have been inimical to the policy which the Act embodies. Ignorance of the true facts would become the popular defense of all employers accused of unfair or deceptive practices. According to basic tort principles, if a person is not and should not be aware of the illegal or harmful nature of his or her act, having exercised due diligence, the person has not acted negligently. While few companies are likely to encourage deceit and bad faith by their employees, some would intentionally fail to investigate employee recommendations beneficial to the company but violative of

St. 1972, c. 614, § 2 (*see* *Nader v. Citron*, 372 Mass. 96, 96-97, 360 N.E.2d 870, 870 [1977]) these protections were extended to persons engaged in trade or commerce in business transactions with other persons also engaged in trade or commerce.

Id.

⁵⁵ *See* *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 856, 443 N.E.2d 1308, 1317-18 (1983).

⁵⁶ *Id.* *See also* *Qantel*, 571 F. Supp. at 1374 (court ruled that the fraud was not egregious enough to warrant greater than double damages).

⁵⁷ *Qantel*, 571 F. Supp. at 1374-75 (court noted that negligence would not present the requisite culpable state of mind for multiple damage award, and went on to find that a speaker making a statement without firm knowledge of its truth or falsity constitutes a wilful violation); *Linthicum*, 379 Mass. at 388, 398 N.E.2d at 487-88 (breach of contractual warranties which was primarily attributable to inexperienced and unsupervised employees held to be negligent violation not compensable by multiple damages).

⁵⁸ *See* *McGrath v. Mishara*, 386 Mass. 74, 85, 434 N.E.2d 1215, 1222 (1982). *See also* RESTATEMENT (SECOND) OF TORTS § 909, comment b (1982), which reads in pertinent part:

Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.

Id.

the Act. If intentional ignorance could be proven, the company executives would be charged with constructive knowledge since they should have been aware of the employee's malicious conduct.⁵⁹ Intentional ignorance would therefore not provide a defense for the company. The victim will generally find it very difficult, however, to prove that the company purposely remained ignorant of their employee's secret motives. In short, if ignorance of the situation shields a corporation from punitive damage liability, the incentive for demanding scrupulous conduct by its employees will be diminished.

The *Wang* case mixes elements of two common scenarios which the courts have addressed to create a new situation. Where an employee intentionally commits an unfair trade practice within his scope of employment which requires no ratification or execution by superiors because of the authority vested in the employee, the company is liable for multiple damages.⁶⁰ However, the company is liable only for single damages where its executives negligently violate the Act, with no intentional misconduct underlying the violation.⁶¹ In *Wang*, the executives who wrongfully terminated BI's contract were merely negligent, suggesting a single damage remedy, but acted on the intentionally deceitful representations of its employee, thereby raising the multiple damage issue. The Court imputed the employee's intent to the company and awarded BI multiple damages.

Another mixed-intent scenario which could arise is where the employee intentionally misrepresents the facts to the decision-maker, as in *Wang*, but the executives commit an unfair trade practice innocently rather than negligently because they have no reason to know or suspect that their information is false or their conduct is improper. The Court's straightforward, mechanical application of the respondeat superior test in *Wang*, with no discussion of mitigating factors or additional considerations implicated by the Act's purpose, suggests that the Court would also impute

⁵⁹ See *supra* note 53.

⁶⁰ See, e.g., *Datacomm Interface, Inc. v. Computerworld, Inc.* 396 Mass. 760, 778-79, 489 N.E.2d 185, 197-98 (1986) (company liable for multiple damages where one of its principals, acting on its behalf, knowingly misstated facts in a complaint against a competitor, used the litigation as a marketing tool against the competitor, and misrepresented to the competitor that he was handing over his only copy of a circulation list owned by the competitor).

⁶¹ See, e.g., *Wasserman*, 22 Mass. App. Ct. at 680-81, 497 N.E.2d at 24. In absolving the owner of a commercial property of liability for more than single damages to his lessee for refusing to execute a new lease negotiated by the owner's apparent agent, thereby foiling an attempted sale by the lessee to the prospective new tenant, the court commented, "[t]his is not a case involving the intentional employment of sharp practices; rather it is one in which an otherwise justifiable business decision entailed, as an unintentional and presumably unwanted side effect, injury to one protected by the statute." *Id.* at 681, 497 N.E.2d at 25. See also *Linthicum*, 379 Mass. at 388, 398 N.E.2d at 487-88.

the employee's wilfulness onto a company which innocently violates the Act.

The Court noted the *Wang* executives' negligence, but did so simply in a factual context and not as an element in the imputation of wrongful intent. The attorney litigating an "innocent violation induced by intentional misconduct" case must consider the possible distinction from the *Wang* case. Assuming, however, that the employee's conduct satisfies the three prongs of the respondeat superior test: kind of work employed to perform, within time and space limits, and at least partially motivated to serve the employer, the Court most likely will hold the company liable for multiple damages. If the court looks beyond the mechanical rule to the policies behind the multiple damage provisions,⁶² the result should be the same. In order to provide the necessary incentive for firms to scrutinize their employees' conduct, the company must be fully accountable for its practices. Thus, both the *Wang* Court's vicarious liability rule and the deterrence policy behind the Act's multiple damage section support an imputation of an employee's malicious intent to the company which innocently relies on the employee's representations.

In conclusion, a primary purpose of the multiple damage provision of the Act is to provide a deterrent to unfair trade practices. The Court has promoted this policy by holding a corporation liable for multiple damages under the Act for its executives' reliance on intentional misrepresentations of an employee resulting in a violation of the Act. Where the employee has acted within the scope of his employment, the company is properly liable for the conduct. The imposition of punitive damages provides a necessary incentive for businesses to scrutinize their employees' work and to encourage honest trade and commerce. The Court did not discuss the importance of the executives' negligence to its decision to impute the employee's wrongful intent onto the company. Nevertheless, if the company had innocently relied on the employee's misrepresentations, both the respondeat superior doctrine and the multiple damage provision's underlying policy would have likely supported an award of multiple damages.

⁶² See *supra* note 54 for a discussion of the policies underlying § 11.

